

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

SARAH YOUNG, et al, Plaintiffs

v.

No. 4:97CV36-EMB

FRED'S SUPER DOLLAR STORES
OF TENNESSEE, INC., Defendant

O P I N I O N

Presently before the court in the above entitled action are plaintiffs' Motion for Voluntary Dismissal Without Prejudice and defendant's Motion for Summary Judgment. The parties in the above entitled action have consented to trial and entry of final judgment by the United States Magistrate Judge under the provisions of 28 U.S.C. §636(c), with any appeal to the Court of Appeals for the Fifth Circuit.

Plaintiffs move to dismiss because "they no longer desire to pursue this action." Defendant opposes the dismissal without prejudice because it has expended considerable time, money and effort in preparing this case for trial, discovery is now complete, and it claims it would suffer prejudice if the cause were dismissed only to be refiled in another forum. Defendant has moved for summary judgment on the ground that plaintiffs cannot prove that the defendant breached any duty owed to them. In support of its motion, defendant has provided the depositions of Doristene Bryant and Sarah Young, and the affidavit of Curtis Anderson. In response, plaintiffs contend that numerous issues of material fact exist which a finder of fact must decide, and that the deposition transcripts and affidavit supplied by the defendant support their position that the duty to

maintain the premises of Fred's Dollar Stores in Belzoni, Mississippi, in a safe condition was breached. No brief was filed by the plaintiffs.

VOLUNTARY MOTION TO DISMISS

This case was removed from state court on March 14, 1997. A case management conference has been held, scheduling deadlines have been set, and discovery is now complete. The court agrees with defendant, and the authorities cited in their response to plaintiffs' motion, that dismissal without prejudice at this late stage of the proceedings would unfairly prejudice the defendant. Consequently, plaintiff's motion to dismiss is denied.

FACTS

The facts of this case are simple, and the parties are in basic agreement upon them. Sarah Young went with her granddaughter, Doristene Bryant, to the Fred's Dollar Store in Belzoni, Mississippi, on June 2, 1995, to buy washing detergent. Young slipped and fell on some yellow dishwashing liquid in the aisle where detergents are located. No one was in the aisle with Young, except her granddaughter (Young Depo., at 26), and she did not know how long the liquid had been there, whether or not anyone had told the store manager about the liquid being in the floor, or how it got there (Young Depo., at 27).

Young stated that she was helped up by her grand-daughter, and they went immediately to the hospital (TR 33). She further stated that management was informed and a report completed on the incident the next day (TR 31). As a result of her fall, Young has a knot on her back and now wears a back brace, and she suffered a large bruise on the inside of her hip all the way to her knee and one on her hand which, she says, is caused by a bone in her hand being pulled out of

place (TR 39). These conditions cause her "misery" no matter what she is doing, all the time, and she can do absolutely nothing all day except sit and look around her house (TR 53, 77).

Ms. Bryant told a somewhat different story about the events at the store. She stated that they told some employees immediately after the incident happened and she saw someone go to the aisle and mop up the spill right then (Bryant Depo., TR 30). Then, they went to the hospital (TR 31).

Curtis Anderson, manager of Fred's, averred in his affidavit that Young fell about thirty minutes before the store closed (Anderson Affidavit, at ¶2). Anderson further averred that he had just walked aisle six where the cleaning supplies were located, because he walked all the aisles shortly before closing to make sure everything is stocked and cleaned (Affidavit, at ¶2). He averred that the spill could not have been on the floor more than five or ten minutes, because there was nothing on the aisle when he went through it, there were no people working on the aisle, and none of the employees spilled anything or saw anyone spill anything (Affidavit, at ¶2). Anderson further averred that he heard Young tell a cashier that she had slipped, but did not fall, and that if she had actually fallen she would have sued (Affidavit, at ¶3). Anderson then sent someone over to mop up the spill (Affidavit, at ¶4).

LAW

The duty owed by Fred's to Young is to keep the premises in a reasonably safe condition, or warn the invitee of dangerous conditions, not readily apparent, which the owner or occupant knows of or should know of in the exercise of reasonable care. Drennan v. The Kroger Company, 672 So.2s 1168, 1169 (Miss. 1996). When a dangerous condition on the floor of the business is caused by a third person, not an employee of the store, the plaintiff must show that the

store operator had actual or constructive knowledge of its presence. Waller v. Dixieland Food Stores, Inc., 492 So.2d 283, 284 (Miss. 1986).¹ Constructive knowledge may be established by proof that the condition existed for a period of time such that a reasonable store operator should have known about it. Id., at 284-85.

There is absolutely no proof that the store employees were responsible for the spill, or knew anything about it. Store manager Curtis Anderson attested that none of his employees were working on aisle six before the spill, and when questioned, none of them admitted to spilling anything or of having any knowledge about it. Anderson further attested that he had been down aisle six "5 or 10 minutes" before Young fell and saw nothing in the floor. Young and the only other witness to the accident, Doristene Bryant, both stated that they had no knowledge of who spilled the liquid, or when it occurred, and that as soon as the store employees were told of the spill, it was immediately mopped up.

There must be some evidence of a breach of defendant's duty to the plaintiff -- proof that the store operator knew or in the exercise of reasonable care should have known of the spill. Waller, supra. Plaintiff has offered nothing to establish that the spill was on the floor long enough to constitute constructive notice to the defendant. Accordingly, there is no evidence that defendant breached its duty to the plaintiff.

"[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that

¹When the negligence is "traceable" to the store operator, then no knowledge of the dangerous condition need be shown. Waller, at 284.

party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Also, under Rule 56(e), FRCP, a party against whom a motion for summary judgment is made may not merely rest upon his pleadings, but must, by affidavit, or other materials as provided in Rule 56, inform the court of specific facts showing that there is a genuine issue for trial. Id., at 324. The facts stated in uncontradicted affidavits must be accepted as true. However, the moving party must still show that he is entitled to judgment on those facts as a matter of law, and if he fails to discharge that burden he is not entitled to judgment, notwithstanding the apparent absence of a factual issue. 6, Pt. 2, Moore, Federal Practice (2d Ed.), ¶56.22[2], pp. 56-1341 through 56-1344.

In the court's opinion the defendant has met its burden, and is therefore entitled to judgment as a matter of law.

A separate order in accordance with this opinion shall issue this date.

THIS, the 30th day of October, 1997.

UNITED STATES MAGISTRATE JUDGE

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FINAL JUDGMENT

In accordance with an opinion entered this day, the parties in the above entitled action having consented to trial and entry of final judgment by the United States Magistrate Judge under the provisions of 28 U.S.C. §636(c), with any appeal to the Court of Appeals for the Fifth Circuit,

1. Plaintiff's Motion for Voluntary Dismissal Without Prejudice is hereby denied.

2. Defendant's Motion for Summary Judgment is hereby sustained, and all of plaintiff's claims against Fred's Super Dollar Stores of Tennessee, Inc., are hereby dismissed with prejudice.

All memoranda, depositions, affidavits and other matters considered by the court in ruling on the motion for summary judgment are hereby incorporated and made a part of the record in this cause.

SO ORDERED, this, the 30th day of October, 1997.

UNITED STATES MAGISTRATE JUDGE
